IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10842 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MS.JUSTICE H.N.DEVANI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CHHAYABEN LABHSHANKER MEHTA

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 10842 of 2002

MR. J.R.NANAVATY WITH MR BG JANI for Petitioner No. 1

Mr. A.J.DESAI, AGP for Respondent No. 1

MR. S.N.SHELAT, ADV.GENERAL

with MR. JB PARDIWALA for Respondent No. 2-3

MR ASIM J PANDYA for Respondent No. 4

CORAM : HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 1/12/2004

C.A.V JUDGEMENT

(Per : Hon'ble Ms. Justice H.N.Devani)

1. By way of the present petition, the petitioner challenges the Notification dated 8th August, 2002 issued by the State of Gujarat-the respondent no.1 herein, terminating the services of the petitioner as Judge, Labour Court (Junior Division), Class I.

2. The petitioner graduated in law from the North Gujarat University with high academic distinctions in the year 1991. She passed the LL.M. examination in the year 1994 securing first place in the North Gujarat University and was awarded gold medal. The petitioner obtained experience as an Advocate, and thereafter, she appeared in the examination for Class I post conducted by the Gujarat Public Services Commission on the basis of her academic qualification and experience as an Advocate. She passed the said examination in the year 1999 and on the basis of her placement in the select list at serial no.13, she was offered appointment as Judge, Labour Court by an order dated 16th October, 1999 issued by the respondent no.2. She was appointed under the Government Notification, Labour and Employment Department dated 12th October, 1999. The petitioner joined the services in the Labour Court at Ahmedabad on 21st October, 1999.

3. It is the case of the petitioner that her services were satisfactory and no memo or warning notice in respect of her performance was issued to her. It is the case of the petitioner that on the contrary the Registrar of the High Court had issued her a letter dated 20th April, 2001 stating that her Annual Confidential Report for the year 2000 is reasonably good. It was submitted that for the year 2002, the petitioner was not communicated any remark relating to grading as was done in the year 2001. No adverse remark or memo or warning letter was issued for the said year and she had completed her probation period on 20th October, 2001. It was submitted that during the probation period, her services as Labour Judge were quite satisfactory and without any adverse remark/grading or memo/warning letter. Thereafter, she was transferred to Labour Court, Rajkot by order dated 7th May, 2002 and she had reported on duty at Labour Court, Rajkot on 17th June, 2002. It was contended that after completion of probation period on 20th October, 2001, no letter of confirmation was given, nor was any letter of extension of probation period given, and therefore, she was deemed to be confirmed on

the post immediately on expiry of probation period. By a communication dated 12th August, 2002, respondent no.3-the President, Industrial Court informed the petitioner that her services are put to an end on expiry of probation period from 8th August, 2002. Alongwith the forwarding letter, the impugned Notification dated 8th August, 2002 issued by the respondent no.1 was also enclosed. The said Notification dated 8th August, 2002 is subject matter of challenge in this petition.

4. In the petition, the contentions that were raised were that the probation period of the petitioner was completed on 20th October, 2001, on expiry of two years. No specific letter was ever issued to her extending her probation period from 21st October, 2001, therefore, she was deemed to be a confirmed employee. It was contended that on 8th August, 2002 the petitioner was no longer a probationer, and therefore, her services could not have been terminated except after an inquiry and without giving reasonable opportunity of being heard after informing about the charges against her. It was contended that the text of the Notification records that the conduct of the petitioner was not satisfactory and that, therefore, the impugned Notification terminating the services of the petitioner casts stigma on the petitioner.

5. It was submitted that if the work of the petitioner was not satisfactory during the period of probation, it was the duty cast upon the superior officer to give an opportunity to improve the performance by pointing out the area of poor performance. In the present case, no memo or remark was given to the petitioner, nor was any communication given to the petitioner, and therefore, the petitioner had every reason to believe that her performance was quite satisfactory during the period of probation and that even for the year 2000, a reasonably good grading was given to her and that for the next year, no grading had been given at all. It was contended that the High Court had formed an opinion that the performance and conduct of the petitioner was not satisfactory on the basis of reporting made by the President of the Industrial Court, who has no power or authority to make any observation, remark or reporting in respect of the peformance and conduct of the petitioner. It was submitted that other probationers appointed alongwith the petitioner who had been confirmed in the services by the same impugned Notification, include those probationers to whom advisory memos or memos were issued as against the petitioner to whom no warning or advisory memo was ever issued.

6. The respondent no.2-High Court filed a detailed reply stating that on completion of two years period of probation on 20th October, 2001, the question of appointing or otherwise of 21 candidates, including the petitioner on long term basis on their satisfactory completion or otherwise of the probation period was taken up for consideration by the High Court. The High Court by a letter dated 9th January, 2002 requested the President, Industrial Court, Ahmedabad, who is the Head of the Department for Industrial Courts and Labour Courts in the State to submit his special report in respect of all probationers including the petitioner, giving his considered opinion as regards the merit and fitness of the probationers for their continuation as Labour Court Judges on long term basis. While so requesting, the President was informed that he should take into consideration the judgments delivered by such probationer and other aspects of the judicial service in the report which he would prepare.

7. It was further stated that the President, Industrial Court, Ahmedabad by his letter dated 18th February, 2002, submitted a special report in respect of all probationers including the petitioner. The opinion given by the President in his special report in respect of the petitioner reads as under:

> "She is honest and polite, but her assessment of disposal is not so good, but, her overall assessment is reasonably good. So, she may be appointed on long term basis."

8. It was stated that the High Court while considering the question of appointing the probationers on long term basis on their satisfactory completion of the probation period has taken into consideration various aspects like special report of the President, confidential report during the period of probation in respect of probationers, vigilance cases, departmental inquiries and administrative complaints.

9. It was stated that the following adverse remarks were passed by the President of the Industrial Court in the confidential report of the petitioner for the year 2001:

Personal Characteristics:-

(7) Diligence & Industry In active.

Method of work:-

(e) Overall assessment of Not so good.

It was further stated that thereafter the file of the petitioner was placed before the Honourable the Chief Justice and the Honourable Unit Judge. It was stated that it was opined by the Honourable Unit Judge that:

"Ms.C.L.Mehta is inactive and her disposal is not so good.

This officer cannot be appointed on long term basis, even she is found to be honest and polite by the President, Industrial Court."

It was stated that it was further decided that the file of the petitioner be placed before the Standing Committee on 7-5-2002. It was stated that in the Chamber meeting which was held on 29th June, 2002 it was decided that the petitioner cannot be given appointment on long term basis in view of the unsatisfactory performance and accordingly on 9-7-2002, the Government was informed that the petitioner cannot be appointed on long term basis and that the services of the petitioner be put to an end with immediate effect. In pursuance of the recommendation, the Government vide its Notification dated 8th August, 2002 issued by the Labour and Employment Department terminated the services of the petitioner.

10. The petitioner filed an affidavit-in-rejoinder to the reply filed by the respondent no.2, wherein it was contended that the President of the Industrial Court had filled up the confidential report for the year 2001 in which it was stated that the petitioner is `in active' in reference to "diligence and industry", and so far as overall assessment of disposal is concerned, he has stated that the same is "not so good". It was contended that this confidential report is quite contradictory to his own special report to the High Court wherein it is clearly stated that the petitioner's overall assessment is reasonably good and that she may be appointed on long term basis. It was submitted that before writing confidential report for the year 2001, no warning, memo or oral instruction was given to the petitioner in respect of her performance. Reliance has been placed upon the General Administrative Department Resolution dated 8th March, 1969 to point out that every employee should know about his/her defects and how to remove them and that at no point of time should an employee be kept

ignorant of the reporting officer's opinion when his/her services are not considered satisfactory. It was contended that the entire academic career of the petitioner, service career and confidential report for the year 2000 ought to have been taken into consideration.

11. It was contended that by a letter dated 23rd April,2002, the President of the Industrial Court informed the petitioner about the norms for determining the adequacy of disposal to various categories for the assessment of judicial work done by the Member, Industrial Court and Judges of the Labour Court. It is pointed out that the said document clearly shows that the norms came into effect from 1st April, 2002 and prior thereto, there were no written norms. It was submitted that even otherwise, the peformance of the petitioner in the context of disposal of cases was at par with other Judges of the Labour Court who are confirmed. It was submitted that this Court may call for the details of disposal of cases done by other Judges whose services have been confirmed as well as the confidential report and special report in respect of them so as to ascertain the true facts. It was also contended that the opinion of the Unit Judge was based upon the special report and confidential report of the President of the Industrial Court which is on the face of it contradictory and cannot be relied upon. It was submitted that had the comparative assessment of the disposal of cases been taken into consideration, the services of the petitioner would have been confirmed.

12. Mr. J.R.Nanavati, learned Counsel appearing on behalf of the petitioner has drawn our attention to the academic career of the petitioner to show that she has excelled throughout from the First Year of LL.B. to LL.M. The learned Counsel contended that as per Rule 3 of the Labour Court-Judge (Junior Division), Recruitment Rules,1982, a candidate appointed by direct selection shall be on probation for a period of two years, and that the said rule does not provide for extension of the period of probation. It was contended that the said rule does not provide that probation will be automatically continued beyond the period of probation.

12.1 The learned Counsel has referred to the conditions No.3 and 4 of the Notification dated 12th October, 1999 whereby the petitioner had been appointed on probation for a period of two years as Judge, Labour Court. It was contended that condition no.4 has to be read first and assessment of performance has to be made

during the period of probation. On completion of probation, it is the bounden duty of the respondents to assess the performance of the probationers. It was contended that on a combined reading of conditions no.1, 3 and 4 of the said Notification, on expiry of two years, the probationer automatically acquires the status of permanency. It was submitted rule 3 of the said Rules does not provide for any extension of the period of probation and that the order of appointment cannot go beyond the rule. It was submitted that the reason of the rule shows that two years probation is mandatory and that the respondents cannot go beyond the rule and extend the period of probation. It was submitted that there was a solemn assurance by the rule that the probation was for a period of two years only. It was contended that upon completion of the period of probation there was an automatic confirmation.

12.2 The learned Counsel submitted that the qualifying (upper age limit) for the appointment of Judge, Labour Court is 45 years. It was contended that Advocates are recruited as they are familiar with the system and that since trained Advocates are recruited, their ability to work cannot be tested and that the same is unquestionable. It was contended that looking to the upper age limit, persons of considerable age and experience are recruited, and they cannot be thrown out when they are on the verge of retirement.

12.3 The learned Counsel contended that the content of the rule must be percolated in the order and the decision should be taken before expiry of two years. He submitted that power of extension can be provided by the rules and that there cannot be any deemed extension. It was contended that the rule lays down the maximum period of probation and nothing more and in the facts of the present case, the rule is absolute and unqualified and that the order of appointment has to be read in harmony with the rules.

12.4 The learned Counsel referred to the circular dated 30th March, 1989 wherein the guidelines for putting an end to and extending the period of probation of employees/officers appointed on probationary basis are laid down. Reference was made in particular to clause (10) of the said circular which provides that under any circumstances, within three months of completion of the period of probation, the probationary period should be put to an end and orders giving long term appointment or extending the period of probation should be passed.

12.5 The learned Counsel referred to paragraphs 4 and 5 of the affidavit in reply filed on behalf of the respondent no.2 and submitted that the special report was called for from the President, Industrial Court who was also the author of the confidential reports of the petitioner. It was submitted that the author of the confidential reports has said that the petitioner is fit for being confirmed. The learned Counsel also referred to paragraph 8 of the reply wherein the adverse remarks in the confidential report for the year 2001 in respect of the petitioner are set out and submitted that analysis of the affidavit shows that the special report made by the President, Industrial Tribual, shows that the petitioner was fit for long term appointment. The learned Counsel also referred to to the said confidential report wherein under the heading "method of work", the overall assessment is shown to be " not so good" and submitted that there is an element of absurdity in the expression "not so good".

12.6. The learned Counsel for the petitioner contended that the impugned order must meet with the test of Aricle 14, in that, the decision must be rational and the same must be uniformly applied to the cases at hand. It was submitted that the probative value of the material on record must be considered.

12.7. Referring to the facts of the present case, the learned Counsel submitted that the decision contained in the impugned order is based on reasons that are discriminatory. It was contended that the same principle is applied differently to different persons. It was contended that there was no criteria for disposal at the relevant time. The learned Counsel also referred to the communication dated 23rd April, 2002 addressed to the petitioner by the President, Industrial Court, wherein it was stated that the norms of disposal and guidelines are brought into force with effect from 1st April, 2002, and contended that the norms which were not in force could not have been taken into consideration for the purpose of assessing the performance of the petitioner. The learned Counsel drew our attention to the disposal sheet annexed as Annexure "H" wherein details regarding the cases disposed by the petitioner are set out. The learned Counsel submitted that the said disposal sheet has to be read in juxtaposition with the norms provided at Annexure "H (h)" to the petition. He submitted that there is nothing to show as to whether anything was done to check the veracity of the report submitted by the President,

Industrial Court.

12.8 The learned Counsel contended that prior to April, 2002, no standards had been laid down regarding disposal. He submitted that the assessment of a candidate depends on the overall assessment of the entire record. It was submitted that the High Court has not considered the overall assessment and that the petitioner was entitled to consideration of the overall assessment of her work.

12.9 The learned Counsel contended that in his report the President, Industrial Court says that the petitioner is inactive and that the disposal is not so good, but he has not placed the positive things before the Judges of the High Court. It was submitted that overall assessment can be made upon consideration of the positive and negative points taken together.

12.10 The learned Counsel emphasized that the special report says that " She is honest and polite. Her assessment of disposal is not so good, but her overall assessment is reasonably good. So, she may be appointed on long term basis", and the Honourable Unit Judge opined that the petitioner is inactive and that the disposal is not so good and that she cannot be appointed on long term basis even if she is found to be honest and polite by the President, Industrial Court. It was contended that the Honourable Unit Judge appears to have formed his opinion on the basis of the report of the President, Industrial Court and does not say anything about the overall consideration of the petitioner's service record. It was contended that when one says that the disposal is not so good, then it can be said to be fair. It was also contended that the fact that the Notification regarding disposal came later, has been overlooked. Moreover, as per the Annual Confidential Report for the year 2001, the disposal of heavy and contested matters was good, and therefore, disposal of petty matters was not so good. It was contended that this aspect has not at all been considered. It was submitted that the positive material of two years has not at all been taken into consideration. It was also submitted that other similarly situated candidates are continued on the basis of overall assessment and that in the case of the petitioner, the overall assessment has not been considered.

12.11 The learned Counsel submitted that on an application of the Wednesbury's principle, the impugned order should satisfy the test as to whether a reasonable

man would upon overall assessment of the petitioner's service record, terminate her services.

12.12 It was contended that the two grounds upon which the impugned order is based, would be subject to judicial review. Thus, all aspects have to be considered in conjunction with all the positive aspects which are emanating from the Annual Confidential Reports of the two years which had not been considered. It was submitted that the author of the two entries has himself recommended that the petitioner should be continued. It was contended that satisfaction should be arrived at on an overall assessment and that the conclusion has to be arrived at after giving proper probative value of each criteria which has not been done in the present case.

13. In support of his contentions, the learned Counsel for the petitioner has relied upon the following precedents:

(a) The decision of the Supreme Court in the case of C.G.SHARMA V. STATE OF GUJARAT reported in 2001(3) G.L.H. 643, was cited for the proposition that even if the power is there to terminate at the end of the probation period or during the extended period of probation at any time, such power cannot be exercised in an arbitrary manner. It was observed that, arbitrariness strikes at the very root of the principle of reasonableness, prudence and rationality. It was found that there is a clear and transparent case of arbitrary exercise of power and that the respondents have failed to place any material on record whatsoever in support of the case as to why and on what basis the work of the appellant could not be said to be satisfactory, when the cases in which the work was assessed to be poor repeatedly were also confirmed and petitioner as well as others were all appointees of the year 1991. It was observed that had uniformity been followed and the norms of disposal been applied in an even manner and there had been objective appraisal of data on record on a uniform yardstick, the petitioner could not be terminated. It was held that when the probationers are taken for confirmation or termination different yardsticks cannot be applied and that norms on which the question is taken up and applied should be uniform and if any departure is made, adequate reasons are required to be recorded.

(b) The decision of the Supreme Court in the case of HIGH COURT OF M.P. V. SATYA NARAYAN JHAVAR reported in (2001) 7 SCC 161, was cited to point out that the Supreme Court has laid down three classifications of cases in the matter of probationers. It was observed therein that one line of cases is where in the service rules or the letter of appointment a period of probation is specified and the power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases there is no bar against termination at any point of time after expiry of the period of probation. The other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that the officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry the order of termination has not been passed. The last line of cases is where, though under the rules maximum period of probation is prescribed, but the same requires a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases even if the maximum period of probation has expired and neither any order of confirmation has been passed nor has the person concerned passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired.

It is contended that the case at hand falls within the second line of cases, and that, therefore, the petitioner is deemed to have been confirmed upon the expiry of the period of probation.

(c) The decision in the case of COMMISSIONER OF POLICE, HUBLI AND ANOTHER V. R.S. MORE reported in (2003) 2 SCC 408, was cited wherein the decision in the case of HIGH COURT OF M.P. V. SATYA NARAYAN JHAVAR (Supra) has been followed.

(d) The decision of the Supreme Court in the case of

INDIAN RAILWAY CONSTRUCTION CO.LTD. V. AJAY KUMAR reported in AIR 2003 SC 1843 was cited to canvass the proposition that exercise of power whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of power is manifestly arbitrary. It was observed that in general, a discretion must be exercised only by the authority to which it is committed and that such authority must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrary and capriciously. It was observed that discretion may be improperly fettered because irrelevant considerations have been taken into account.

14. Mr. S.N. Shelat, learned Sr. Advocate and Advocate General submitted that there are mainly three aspects of the matter, namely:

(i) What is the status of the present petitioner,
(ii) Whether there is an automatic confirmation,
(iii) Scope of judicial review in the matter of assessment of the work of a probationer.

14.1 Insofar as the first aspect is concerned, the learned Advocate General submitted that the Court will have to look to the order of appointment to find out what is the status of the petitioner. He referred to the order of appointment dated 12th October, 1999 and pointed out that the appointment of the petitioner was temporary, ad hoc and on probation for a period of two years. It was submitted that, thus, the status of the petitioner is ad hoc, temporary or probationary till appointed on regular or long term basis.

14.2 Insofar as the second aspect is concerned, the learned Advocate General referred to the order of appointment and submitted that there is nothing to show that on expiry of period of two years, long term appointment will be given or that the petitioner will be deemed to be continued. It was submitted that status of ad hoc and temporary employee cannot be altered by mere long continuation. It was submitted that the rules also do not provide for a maximum period of probation and do

not specify that two years is a limit beyond which no probation can continue. It was submitted that there can be no automatic alteration of status unless that result is specifically envisaged by some provision in the statutory rules.

14.3 Insofar as the third aspect regarding the scope of judicial review in respect of assessment of the performance of the probationer, the learned Advocate General submitted that judicial review of the decision was permissible only in three eventualities, namely:

(i) When the decision was based upon totally non-existent material,
(ii) When the power was exercised for collateral purpose,
(iii) Or that the same is arbitrary.

It was contended that as to what factors weighed with the Court cannot be justiciable. It was submitted that the fact that comparative aspect has been employed by the employer has also to be considered. It was contended that once the assessment is supported by some material and it is not mala fide, the High Court will not interfere and substitute its satisfaction.

14.4 The learned Advocate General referred to the adverse remarks passed by the President, Industrial Court in the confidential report of the petitioner for the year 2001, which are reproduced in the affidavit-in-reply and submitted that the Court cannot say that `inactive',and `not so good' are not relevant considerations. It was submitted that the report of the President, Industrial Court is that the petitioner is required to be continued, however, the High Court has considered the petitioner's case and that these two considerations outweigh everything else.

15. The learned Advocate General, in support of his arguments, referred to the following decisions:

(a) The decision of this Court in the case of PRANTIYA KAMDAR SEN & ANR. V. STATE OF GUJARAT & ANR. reported in 1999(2) G.L.R 965, was cited to point out that since the validity of the Recruitment Rules was in question, the condition of ad hoc etc. were imposed in the order of appointment as appointments were made pursuant to the directions of the High Court.

(b) The decision of the Supreme Court in the case of

PARSHOTAM LAL DHINGRA V. UNION OF INDIA reported in AIR 1958 SC 36, was cited for the proposition that appointment to a permanent post in a Government service, either on probation or on an officiating basis, is from the very nature of such employment, itself of a transitory character and, in the absence of any special contract of the service, the implied term of such appointment, under the ordinary law of master and servant, is that it is terminable at any time.

(c) The decision of the Supreme Court in the case of STATE OF M.P AND ANOTHER V. DHARAM BIR reported in (1998) 6 SCC 165, was cited for the proposition that whether a person holds a particular post in a substatntive capacity or is only temporary or ad hoc is a question which directly relates to his status and that it all depends upon the terms of appointment. It was held that it is not open to any Government employee to claim automatic alteration of status unless that result is specifically envisaged by some provision in the statutory rules. Unless, therefore, there is a provision in the statutory rules for alteration of status in a particular situation, it is not open to any Government employee to claim a status different from that which was conferred upon him at the initial or any subsequent stage of service.

(d) The decision of this Court in the case of K.D. VOHRA AND OTHERS V. KAMLESHBHAI GOBARBHAI PATEL reported in 2003(1) G.L.H. 312, was cited for the proposition that it is not open for any Government employee to claim automatic alteration of status unless that result is specifically envisaged by some provision in the statutory rules.

(e) The decision of the Supreme Court in the case of STATE OF UTTAR PRADESH V. AKBAR ALI KHAN reported in AIR 1966 SC 1842, was cited for the proposition that confirmation in the post which a probationer is holding does not result merely from the expiry of the period of probation, and so long as the order of confirmation is not made, the holder of the post remains a probationer. It was observed that it has been held by the Court that when a first appointment or promotion is made on probation for a specified period and the employee is allowed to continue in the post,

after the expiry of the said period without any specific order of confirmation he continues as a probationer only and acquires no substantive right to hold the post. If the order of appointment itself states that at the end of the period of probation the appointee will stand confirmed, in the absence of any order to the contrary, the appointee will acquire a substantive right to the post even without order of confirmation. It was held that in all other cases, in the absence of such an order or in the absence of such a service rule, an express order of confirmation is necessary to give him such a right. It was held that where after the period of probation an appointee is allowed to continue in the post without an order of confirmation, the only possible view to take is that by implication the period of probation has been extended, and it is not a correct proposition to state that an appointee should be deemed to be confirmed from the mere fact that he is allowed to continue after the end of the period of probation.

(f) The decision of the Supreme Court in the case of KEDAR NATH BAHL V. THE STATE OF PUNJAB AND OTHERS reported in AIR 1972 SC 873 was cited for the proposition that where a person is appointed as a probationer in any post and a period of probation is specified, it does not follow that at the end of the said specified period of probation he obtains confirmation automatically even if no order is passed in that behalf. It was held that unless the terms of appointment clearly indicate that confirmation would automatically follow at the end of the specified period or if there is a specific rule to that effect, the expiration of the probationary period does not necessarily lead to confirmation.

(g) The decision of this Court in the case of POPATLAL VASUDEV VYAS. V. GUJARAT WATER SUPPLY AND SEWERAGE BOARD, GANDHINAGAR AND OTHERS reported in 29 (2) G.L.R. 895, was cited to point out that in the said case the rules provided for appointment on probation for a period of one year. It was observed that the said rules nowhere indicated that the period of probation cannot be extended or that on expiry of the said period the employee will be automatically confirmed without any express order by the employer. It was observed that it was

true that the said Rules did not contain a provision for extension of probation, at the same time they also did not contain any prohibition against extension. It was held that the decision of the Supreme Court in KEDAR NATH V. STATE OF PUNJAB applied on all fours.

(h) The decision of the Supreme Court in the case of HIGH COURT OF M.P.AND OTHERS V. SATYA NARAYAN JHAVAR (Supra), was cited for the proposition that confirmation in the post which a probationer is holding does not result merely from the expiry of period of probation and so long as the order of confirmation is not made the holder of the post remains a probationer.

(i) The decision of the Supreme Court in the case of DR. T.C.M. PILLAI V. THE INDIAN INSTITUTE OF TECHNOLOGY, GUINDY, MADRAS, reported in AIR 1971 SC 1811, was cited for the proposition that it is well settled that a probationary or a temporary servant can be discharged if it is found that he is not suitable for the post which he is holding, and that this can be done without complying with the provisions of Article 311 (2) unless the services are terminated by way of punishment.

(j) The decision of the Supreme Court in the case of AIR INDIA CORPORATION, BOMBAY V. V.A. REBELLOW AND ANOTHER reported in AIR 1972 (1) SCC 814, was cited for the proposition that the opinion formed by the employer about the suitability of his employee for the job assigned to him though erroneous, if bona fide, is not subject to judicial review.

(k) The decision of the Supreme Court in the case of ISHWAR CHAND JAIN V. HIGH COURT OF PUNJAB reported in AIR 1988 SC 1395, was cited to point out that the Supreme Court has intervened only when the decision was based upon non-existent material.

(l) The decision of the Supreme Court in the case of HIGH COURT OF M.P. V. MAHESH PRAKASH AND OTHERS, reported in AIR 1994 SC 2595, was cited for the proposition that every Civil Judge up for confirmation in Class-II, being a class to which he had been recruited, was liable to be judged individually on his own record and that comparative assessment of records is not

warranted.

(m) The decision of the Supreme Court in the case of HIGH COURT OF JUDICATURE AT PATNA V. PANDEY MADAN MOHAN PRASAD SINHA AND OTHERS reported in (1997) 10 SCC 409, was cited for the proposition that as regards probationer, the law is well settled that he does not have a right to hold the post during the period of probation. It was held that an order terminating the services of a probationer can be questioned only if it is shown that it has been passed arbitrarily or has been passed by way of punishment without complying with the requirements of Article 311(2) of the Constitution.

(n) The decision of the Supreme Court in the case of OSWAL PRESSURE DIE CASTING INDUSTRY, FARIDABAD V. PRESIDING OFFICER AND ANOTHER reported in 1998 (3) SCC 225, was cited for the proposition that it is not open for the High Court to sit in appeal over the assessment made by the employer of the performance of the employee. It was held that once it was found that the assessment made by the employer was supported by some material and was not mala fide, it was not proper for the High Court to interfere and substitute its satisfaction with the satisfaction of the employer.

16. Two questions arise for the consideration, of this Court. Firstly, whether the continuance of the petitioner on the post beyond the probation period entitles her to claim deemed confirmation, in the absence of a specific order passed by the competent authority to that effect and secondly, even if it is held that there is no automatic confirmation, whether upon consideration of the facts of the case, any intervention by this Court is warranted.

17. Rule 3 of the Recruitment Rules for the post of Labour Court Judge (Junior Division),1982 read as under:-

"Rule 3: A candidate appointed by direct selection shall be on probation for a period of two years."

The Recruitment Rules neither provide for any extension of the period of probation nor do the same provide for any maximum period of probation. The same are also silent so far as the mode of confirmation is concerned.

18. However, several conditions are laid down in the order of appointment dated 12th October, 1999. Conditions No.3 and 4 which are relevant for the purpose of the present petition as translated in English, read as under:

> "3. Upon satisfactory completion of probation period, long term/regular appointment shall be given and upon orders for regular appointment being made, the same shall be considered as regular appointment."

> "4. If services during the probationary period are not found to be satisfactory by the competent authority, the services shall be brought to an end with immediate effect during the probationary period without giving any notice, i.e., during the period of probation, services shall be considered to be ad hoc and temporary."

19. Thus, the appointment order itself envisages the making of orders for long term/ regular appointment upon satisfactory completion of probation. Hence, the question of automatic confirmation is negatived by the order of appointment itself.

20. The Supreme Court has in the case of The State of Punjab V. Dharam Singh reported in AIR 1968 SC 1210, observed that the Court has consistently held that when a first appointment or promotion is made on probation for a specific period and the employee is allowed to continue in the post after the expiry of the period without any specific order of confirmation, he should be deemed to continue in his post as a probationer only, in the absence of any indication to the contrary in the original order of appointment or promotion or the service rules. It was held that in such a case, an express order of confirmation is necessary to give the employee a substantive right to the post, and from the mere fact that he has right to continue in the post after the expiry of the period of probation, it is not possible to hold that he should be deemed to have been confirmed.

21. Subsequently in the case of Kedar Nath Bahl (Supra), the Supreme Court held that where a person is appointed as a probationer in any post and a period of probation is specified, it does not follow that at the end of the said specified period of probation he obtains

confirmation automatically even if no order is passed in that behalf. It was held that unless the terms of appointment clearly indicate that confirmation would automatically follow at the end of the specified period or there is a specific rule to that effect, the expiration of the probationary period does not necessarily lead to confirmation. It was held that at the end of the period of probation an order confirming the officer is required to be passed and if no such order is passed and he is not reverted to his substantive post, the result merely is that he continues in his post as a probationer. In the facts of the present case, there is an express provision which requires the making of an order of long term/regular appointment upon satisfactory completion of probationary period. Hence, there is no question of automatic confirmation of probation.

22. In the case of Md. Muzaffar Alam V. State of Bihar and Others reported in (2001) 10 SCC 169, wherein the statutory rule provided the period of probation for two years, the Supreme Court observed that the rule neither indicates that the period of probation can be continued, nor does it indicate that confirmation is automatic after the expiry of the period of probation. In the circumstances, the Supreme Court rejected the contention that the employee is bound to be confirmed on the expiry of the period of probation.

23. In the case of High Court of M.P and Others V. Satya Narayan Jhavar (Supra), the Supreme Court while examining the question of deemed confirmation in service jurisprudence has categorized three classes of cases on the point, which are as under:

"One line of cases is where in the service rules or the letter of appointment a period of probation is specified and the power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases there is no bar against termination at any point of time after expiry of the period of probation. The other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that the officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry the order of termination has not been passed. The last line of

cases is where, though under the rules maximum period of probation is prescribed, but the same requires a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases even if the maximum period of probation has expired and neither any order of confirmation has been passed nor has the person concerned passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired."

The said decision has been followed by the Supreme Court in the case of Commissioner of Police, Hubli and Another V. R.S. More reported in (2003) 2 SCC 408.

24. Reading Rule 3 of the Rules with condition no.3 of the appointment order, it is clear that confirmation in the post which a probationer is holding does not result merely from the expiry of the period of probation and so long as order of confirmation is not made the holder of the post remains a probationer.

25. In our view, the case at hand falls under the third line of cases as categorized by the Supreme Court. The rules read with the order of appointment do not provide for a deemed confirmation on expiry of the period of probation and on the other hand, the order of appointment contemplates a positive order of confirmation to be passed if the period of probation has been satisfactorily completed. Though, the impugned order of termination has been passed after the period of probation was over, in our view, that by itself would not entitle the petitioner to claim deemed confirmation, in the absence of a specific order to that effect.

26. As regards the second question as to whether the impugned order warrants any interference by this Court, the learned Counsel for the High Court has produced before us the Annual Confidential Reports of the petitioner as well as the submission made to the Hon'ble the Chief Justice and the Hon'ble Unit Judge containing the special report on each of the probationary Labour Court Judges forwarded by the President, Industrial Court. Upon perusal of the said report, it is found that out of eighteen candidates, there are no adverse remarks against nine candidates. In so far as other nine candidates including the petitioner are concerned, the adverse remarks in the confidential report for the period from 1-1-2001 to 31-12-2001 were also submitted.

27. We have carefully gone through the record. In so

far as the assessment of the performance of the petitioner is concerned, the evaluation as per the confidential report is as follows:

For the period between 21st October, 1999 to 31st December, 1999 in Part III of Form no.II which is filled up by the Reporting Officer in his report dated 31-1-2000, the grading given against most of the columns is"good".

For the period between 1st January 2000 to 31-12-2000 in Form No.IV against item no. II and IV, the following remarks are given:

(II) Personal Characteristics:

(1) Personality : Good

(2) State of Health : Good

(3) General knowledge : Good

(4) Clarity of thought and expression in correspondence and discussion.	: Presently no such correspondence is required to be done by her but she can do it with clarity of thought.	
(5) Initiative	: She can take initiative if occasion arises.	
(6) Tactfulness	: She is tactful.	
(7) Diligence and industry	: She is diligent and industrious.	
(8) Politeness and courtesy	: She is polite and courteous.	
(9) Relations with	: Good relations.	

(IV) Method of work

(a) Whether she takes matters as fixed on board	: Yes

(b) Promptness in pronouncing judgments and orders : Good.

(c) Deciding matters according to priority fixed by High Court by general or special orders : Yes.

(d) Handling of old matters in order of seniority : Good. She has : disposed of some : old matters also.

(e) Overall assessment of disposals : Good

(f) Disposal of heavy contested matters : Good

(g) Punctuality and regularity : Good.

(h) Treatment to members of the Bar. : Good.

(i) Treatment to litigating public : Good.

27.1. Insofar as other columns with regard to `Character', `Administrative capacity', `Ability', `Knowledge of law and `Method of writing judgments', the grading given is "good". The overall assessment given by the District Judge is "reasonably good". The marks assigned out of the total of 100 marks under following heads are as under:

II Personal Characteristics - 20 - 10

III Administrative capacity - 15 - 08

IV Method of work - 20 - 15

V-VI-VII Ability, Knowledge
of law, Method of
writing judgments 45 - 25

27.2 For the period between 1-1-2001 to 31-12-2001 in Form No.IV against item no. II and IV , the following remarks are given:

(II) Personal Characteristics

(1) Personality : Good.

(2) State of health : Good.

(3) General knowledge : Good.

(4) Clarity of thought : Good.
and expression in
correspondence and
discussion.

(5) Initiative : Active.

(6) Tactfulness : Good.

(7) Diligence and : In Active.
industry

(8) Politeness and
Courtesy : Polite.

(9) Relation with
colleagues : Good.

IV Method of work

(a) Whether he takes
matters as fixed
on Board. : Yes.

(b) Promptness in
pronouncing
judgments : Yes

(c) Deciding matters
according to priority
fixed by High Court
by general or

special orders : Yes.

(d) Handling of old
matters in order
of seniority : Yes.

(e) Overall assessment
of disposals : Not so good.

(f) Disposal of heavy : Good.
contested matters

(g) Punctuality and
regularity : Good.

(h) Treatment to members
of the Bar : Polite.

(i) Treatment to
litigating public : Polite.

27.3. Insofar as the `Character', `Administrative capacity', `Ability',` Knowledge of law' and `Method of writing judgments', she has been graded as "good" against most of the columns. The overall assessment is "reasonably good". The total marks assigned under the following heads are as under:

II Personal characterisitics 20 - 13 -

III Administrative capacity 15 - 8 -

IV Method of work 20 - 12
-
V-VI-VII Ability, Knowledge
of law, Nethod of
writing judgments 45 - 20

It may be pertinent to note that despite the fact that for the period between 1-1-2000 to 31-12-2000, against the column of diligence and industry, the petitioner was stated to be "diligent and industrious", and for the period between 1-1-2001 to 31-12-2001, the petitioner was stated to be " In Active ". The marks given under the heading of Personal Characteristics for the period from 1-1-2000 to 31-12-2000 are "10", whereas for the year 1-1-2001 to 31-12-2001, the said marks are "13".

28. We have carefully gone through the Annual Confidential Reports of the petitioner. Despite the said two adverse remarks against the petitioner, the report of

the learned President, Industrial Court was in favour of appointing her on long term basis as her overall performance was rated as reasonably good. A bare look at the Confidential Reports of the petitioner, shows that except for the said two adverse remarks for the year 2001, the overall performance of the petitioner was good. We may note here from the material placed on record on behalf of the respondent no.2 that there were following adverse remarks against one Mr. N.N.Patni, Judge, Labour Court, Himmatnagar, which are as under:

"(IV) Method of work:

(e) Overall assessment of disposal : Not so good.

(V) Ability:

As reflected from R & P in matters under Appeal/Revision with special reference to :

(4) Discussion of law and facts in judgments/orders : Not in detail.

(VI) Knowledge of law:

(2) Whether he has studious habits and keeps himself abreast of the case law, statutory law and development of law in general : No.

However, the said Mr. Patni has been confirmed; whereas the petitioner's services have been terminated.

28.1. We find that the respondent no.2 does not appear to have taken into consideration the overall record of the petitioner and the assessment appears to have been made in the context only of the report of the President, Industrial Court which did not mention the positive points of the candidate and also did not contain the Annual Confidential Reports of the previous years, and in fact recommended that she should be continued on long term basis. Thus, the decision of the High Court does

not appear to have been taken on an overall assessment of the performance of the petitioner during the entire period of probation.

28.2 Despite the fact that the petitioner has raised a specific contention in the petition that her performance in the context of disposal of cases was at par with other Judges of the Labour Court who are confirmed and that other probationers appointed alongwith the petitioner who have been confirmed in the services by the same impugned Notification includes those petitioners to whom advisory memos or memos were issued as against the petitioner to whom no warning or memo or advisory memo was ever issued, nothing has been stated in reply thereto.

28.3 In the case of The Manager, Government Branch Press and Another V. D.B.Beliappa reported in (1979) 1 SCC 477, the Supreme Court has held that there is always some reason or cause for terminating the services of a temporary employee. It was held that it is not necessary to state that reason in the order of termination communicated to the employee concerned. But where there is a specific charge of arbitrary discrimination, or some hostile motive is imputed to the authority terminating the service, it is incumbent on the authority making the impugned order to explain by disclosing the reason for the impugned action. It was observed that it is true that the competent authority has a discretion under the conditions of service governing the employee concerned to terminate the latter's employment without notice. But such decision has to be exercised in accordance with reason and fair play and not capriciously. Bereft of rationality and fairness, discretion degenerates into arbitrariness which is the very antithesis of the rule of law on which our democratic policy is founded. Arbitrary invocation or enforcement of a service condition terminating the service of a temporary employee may itself constitute denial of equal protection and offend the equality clause in Articles 14 and 16 (1).

28.4 In the instant case, no special circumstance or reason has been disclosed which would justify discriminatory treatment to the petitioner as a class separate from that of the other probationers who had been confirmed. When the probationers are taken for confirmation or termination, different yardsticks cannot be applied. Norms on which the decision is taken should be uniform and if any departure is made, adequate reasons are required to be recorded. In the instant case, the respondents have failed to explain as to why the services of the petitioner who had a good service record have been

terminated, while similarly situated as well as others with a comparatively less meritorious service record have been confirmed.

29. In the case of Beena Tiwari and Another V. State of Madhya Pradesh and Another reported in 1988 (Supp) SCC 213, the appellants therein were appointed as Civil Judges on temporary and officiating basis for a period of six months for training and thereafter for a period of two years on probation and were ultimately not confirmed by the High Court after the expiry of the period of probation . The High Court recommended the termination of the services of the appellants and pursuant to such recommendation, the State Government terminated the services of the appellants. Being aggrieved by the orders of termination of their services, the appellants filed writ petitions challenging the same. The Supreme Court went through the service records of all the judicial officers and in three cases held that the High Court was not justified in not confirming the said appellants.

29.1 In the case of Indian Railway Construction Co.Ltd. V. Ajay Kumar (Supra), the Supreme Court has held that one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is "illegality", the second "irrationality" and the third "procedural impropriety". It was observed that if the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. It was held that to arrive at a decision on "reasonableness" the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. It was held that in essence, the test is to see whether there is any infirmity in the decision-making process and not the decision itself.

29.2 In the facts of the present case, we find that decision making authority has not taken into consideration several relevant factors like the positive remarks in the petitioner's Annual Confidential Reports and based its decision merely on the basis of the two adverse remarks for the period between 1-1-2001 to 1-12-2001. As regards the adverse remark regarding the overall assessment of disposal being "not so good", we find considerable force in the argument of the learned Counsel for the petitioner that when disposal of heavy and contested matters was shown to be good, as a natural corollary, the overall disposal was bound to be affected

in numerical terms. Moreover, there were no norms of disposal prescribed at the relevant time for the Labour Court Judges. As rgards the adverse remark of " In Active" against the column of " Diligence and Industry", it will be noticed that though such adverse remark had been given, a total of 13 marks were given under the heading "Personal Characteristics" for the said period between 1-1-2001 to 31-12-2001, whereas a total of 10 marks were given against the said heading for the period between 1-1-2000 to 31-12-2000 wherein no adverse remarks were given and the petitioner was marked as active against the column of "Diligence and Industry". Thus, the marks given for the period wherein she had been marked as " In active" against the column of "Diligence and Industry" are more than the marks which were given for the period when she had been marked as "active" against the said column. The respondents have also failed to explain this discrepancy. Thus, the decision to terminate the services of the petitioner apparently has not been taken after considering all the entries in the service record of the petitioner covering the entire period of probation. On going through her overall satisfactory record and the opinion of the Presiding Officer that she deserved to be continued on long term basis the impugned order could not have reasonably been made against her.

30. For the reasons indicated above, we are satisfied that the decision to terminate the services of the petitioner is arbitrary and discriminatory as the same is arrived at by applying uneven standards and without considering the overall service record of the petitioner. In the result, the impugned Notification dated 8th August, 2002 insofar as the termination of the services of the petitioner are concerned, is hereby quashed and set aside. The respondents are directed to reinstate the petitioner with backwages to the post that she was holding prior to the termination of her services and to reconsider the question of her confirmation in the light of this judgment. The petition is accordingly allowed and Rule is made absolute with no orders as to costs.

(R.K.Abichandani,J.)

(Ms.H.N.Devani,J.)

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